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THE HISTORY OF THE REGISTER OF ORIGINAL WRITS.

DE Natura Brevium, Of the Nature of Writs, — such is the title of more than one well-known text-book of our mediæval law. Legal Remedies, Legal Procedure, these are the all-important topics for the student. These being mastered, a knowledge of substantive law will come of itself. Not the nature of rights, but the nature of writs, must be his theme. The scheme of "original writs" is the very skeleton of the Corpus Juris. So thought our forefathers, and in the universe of our law-books, perhaps in the universe of all books, a unique place may be claimed for the *Registrum Brevium*, — the register of writs current in the English Chancery. It is a book that grew for three centuries and more. We must say that it grew; no other word will describe the process whereby the little book became a big book. In its final form, when it gets into print, it is an organic book; three centuries before, it was an organic book. During these three centuries its size increased twenty-fold, thirty-fold, perhaps fifty-fold; but the new matter has not been just mechanically added to the old, it has been assimilated by the old; old and new became one.

It was first printed in Henry VIII.'s reign by William Rastell. Rastell's volume contained both the Register of Original Writs and the Register of Judicial Writs. The former is dated in 1531; at the end of the latter we find accurate tidings — "Thus endyth thys booke callyd the Register of the wryttes oryggynall and judiciall, pryntyd at London by William Rastell, and finished the xxviii day of September in the yere of our lorde 1531 and in the xxiii yere of the rayne of our soverayn lord kyng Henry the

eyght." Whether this book was ever issued just as Rastell printed it I do not know; what I have seen is Rastell's book published with a title-page and tables of contents by R. Tottel, in 1553. In 1595 a new edition was published by Jane Yetsweist, and in 1687 another, which calls itself the fourth, was printed by the assigns of Richard and Edward Atkins, together with an Appendix of other writs in use in the Chancery and Theloall's Digest. In 1595 the publisher made a change in the first writ, substituting "Elizabetha Regina" for "Henricus Octavus Rex;" the publisher of 1687 was not at pains to change Elizabeth into James II. In other respects, so far as I can see from a cursory examination of Rastell's book (which I am not fortunate enough to possess), no changes were made; the editions of 1595 and 1687 are reproductions of the volume printed in 1531, and the correspondence between them is almost exactly, though not quite exactly, a correspondence of page for page.

Coke speaks of the Register as "the ancientist book of the law."[1] In no sense can we make this saying true. But to ask for its date would be like asking for the date of one of our great cathedrals. In age after age, bishop after bishop has left his mark upon the church; in age after age, chancellor after chancellor has left his mark upon the register. There is work of the twelfth century in it; there is work of the fifteenth century, perhaps of the sixteenth, in it. But even this comparison fails to put before us the full ineptitude of the question, What is the date of this book? No bishop, no architect, however ambitious, could transpose the various parts of the church when once they were built; he could not make the crypt into a triforium; but there was nothing to prevent a reforming chancellor from rearranging the existing writs on a new plan; from taking "Trespass" from the end of the book and thrusting it into the middle. No; to ask for the date of the Register is like asking for the date of English law.

When we take up the book for the first time we may, indeed, be inclined to say that it has no arrangement whatever, or that the principle of arrangement is the principle of pure caprice. But a little examination will convince us that there is more to be said. Every now and again we shall come across clear traces of methodic order, and probably in the end we shall be brought

[1] Preface to 9 Rep.

to some classification of the forces which have played upon the book. The following classification may be suggested: (1) Juristic logic; (2) practical convenience; (3) chronology; (4) mechanical chance. Let me explain what I mean. We might expect that the arrangement of such a work would be dictated by formal jurisprudence; we might expect that the main outlines would be those elementary contrasts of which every system of law must take notice, — real, personal — petitory, possessory — contract, tort. Again, knowing something of the English writs, we might expect to find those which begin with "Præcipe" falling into a class by themselves; or, again, to find that those which direct a summons are kept apart from those which direct an attachment; or, again, to find that writs of "Justicies," *i.e.*, writs directing the sheriff to do justice in the county court, are separated from writs destined to bring the defendant into the king's own courts. Well, in part we may be disappointed; but not altogether: formal jurisprudence has had something to do with the final result, though not so much as might be expected. The printed book begins, and every MS. that I have seen, whether it comes from Henry III.'s day or Henry VI.'s, begins with the writ of right. Now, there is logic in this; for whatever actions are "personal," whatever acts are "possessory," — and different ages hold different opinions about this matter, — there can be no doubt that the action begun by writ of right is "real" and "petitory" or "droiturel." Our Register then begins with the purest type of a real and droiturel action. And the logic of jurisprudence has left other marks, especially near the end of the book, where we find Novel Disseisin, Mort d'Ancestor, Cosinage and Writs of Entry, following each other, in what we shall probably call their "natural order." Still, such logic will not, by any means, explain the whole book. It would be quite safe to defy the student of "general jurisprudence" to find Trespass, or Covenant, or *Quare Impedit*, by the light of first principles.

Then, again, practical convenience has had its influence. The first twenty-nine folios of the printed Register are taken up by the Writ of Right, and other writs which have generally collected around that writ. Then a new section of the book begins (f. 30–71); it is devoted to writs which the modern jurist would describe as being of the most divers natures; but they all have this in common, that in some way or another they deal with

ecclesiastical affairs and the clerical organization. The link between this group and that which it immediately succeeds is (f. 29b) the Writ of Right of Advowson. It is a Writ of Right; but having once come across the advowson it is convenient to dispose of this matter once and for all, to introduce the Assize of Darrein Presentment, which is thus torn away from the other possessory assizes, the *Quare Impedit*, the *Quare Incumbravit*, the *Juris Utrum*, and so forth. This brings us into contact, if not conflict, with the church courts; so let us treat of Prohibitions to Court Christian, whether these relate to advowsons, land, or chattels, and while we are about it we may as well introduce the *De excommunicato capiendo*, and so forth; then we shall have done with ecclesiastical affairs. Here, to use the terms that I have ventured to suggest, we see "practical convenience" getting the better of "juristic logic;" or, to put it in other words, matter triumphing over form. But form's turn comes again. We have done with the church; what topic should we turn to next? The answer is, "Waste." But why waste, of all topics in the world? Because, until the making of a certain statute, duly noticed in our Register, the action of waste was an action on a royal prohibition against waste.[1] "Prohibition" is the link which joins "waste" to "ecclesiastical affairs."

Yet another principle has been at work. A section in the middle of the book is devoted to *Brevia de Statuto*, writs that are founded on comparatively modern statutes. What keeps this group of writs together is neither "form" nor "matter," but chronology; they are recent writs, for which neither logic nor convenience has found a more appropriate place. In short, we have here an appendix. But it is an appendix in the middle of the book. We can hardly explain its appearance there without glancing at the MSS.; but even without going so far we can still make a guess. When these statutory writs have been disposed of, we almost immediately (f. 196b) come upon what seems a well-marked chasm. Suddenly the Novel Disseisin is introduced, and then for a long while logic reigns, and we work our way through the possessory actions. If we find, as we may find, a MS. which has several blank leaves before the Novel Disseisin, which honors the Novel Disseisin with an unusual display of the illuminator's art, we have made some way towards a solution of the problem. At one time the book was in mechanically separate sections, and

[1] Stat. Westm. II., c. 14.

the end of one of these sections was a convenient place for a statutory appendix.

After all, however, it is improbable that we shall ever be able to explain in every case why a particular writ is found where it is found, and not elsewhere. The *vis inertiæ* must be taken into account. Writs collected in the Chancery; now and again an enterprising Chancellor or Master might overhaul the Register, have it recopied, and in some small degree rearranged; but the spirit of a great official establishment, with plenty of routine work, is the spirit of leaving alone; the clerks knew where to find the writs; that was enough.

The MS. materials for the history of the Register are abundant. The Cambridge University Library possesses at least nineteen Registers, some complete, some fragmentary; the number at the British Museum is very large. Over the nineteen Cambridge Registers I have cast my eyes. They are of the most various dates. In speaking about their dates it is necessary to draw some distinctions. In the first place, of course, it is necessary to distinguish between the date of the MS. and the date of the Register that it contains, for sometimes it is plain that a comparatively modern hand has copied an ancient Register. In the second place, as already said, it is useless to ask the date of a Register, or of a particular Register, if thereby we mean to inquire for the date when the several writs contained in it were first issued, or first became current; the various writs were invented in different reigns,in different centuries. The sense that we must give to our inquiry is this: at some time or another the official Register of the Chancery was represented by the MS. now before us; what was that time? It will be seen, however, that the question in this form implies an assumption which we may not be entitled to make, — the assumption that our MS. fairly represents what at some particular moment of time was the official Chancery Register. I have as yet seen no MS. which on its face purported to be an official MS., or a MS. which belonged to the Chancellor or any of his subordinates. In very many cases the copy of the Register is bound up in a collection of statutes and treatises, the property of some lawyer or of some religious house. Often an abbey or priory had one big volume of English law, and in such volumes it is common to find a *Registrum Brevium*. Such volumes were lent by lawyer to lawyer, by abbey to abbey, for the purpose of being copied, and it is clear that

a copyist did not always conceive himself bound to reproduce with mechanical fidelity the work that lay upon his desk. Thus, many clerks are quite content that the names of imaginary plaintiffs and defendants should be represented by A and B, while another will make "John Beneyt" a party to every action, and suppose that all litigation relates to tenements at Knaresborough. We have not to deal with the dull uniformity of printed books; no two MSS. are exactly alike; every copyist puts something of himself into his work, even if it be only his own stupidity. Thus, settling dates is a difficult task. Sometimes, for example, a MS. which gives the Register in what, taken as a whole, seems a comparatively ancient form, will just at a few places betray a knowledge of comparatively modern statutes. Gradually, however, by comparing many MSS., we may be able to form some notion of the order in which, and the times at which, the various writs became recognized members of the *Corpus Brevium*.

It will be convenient to mention here that one of the most obvious tests of the age of a Register is to be found in the wording of those writs which expressly mention a term of limitation. There are three such writs; namely, the Novel Disseisin, the Mort d'Ancestor, and the *De nativo habendo*. Now, at the beginning of Henry III.'s reign (1216), the limiting period for the Novel Disseisin seems to have been the last return of King John from Ireland, but in 1229, or thereabouts, there was a change, and Henry's first coronation at Westminster became the appointed date;[1] the Mort d'Ancestor was limited to the time which had elapsed since Richard's coronation. The Statute of Merton (1236), or rather, as I think, an ordinance of 5th Feb., 1237, fixed Henry's voyage into Brittany as the period for the Novel Disseisin, and John's last return from Ireland as the period for the Mort d'Ancestor and *De Nativo*.[2] Statute of Westminster the First (1275, cap. 39) named for the Novel Disseisin Henry's first voyage into Gascony, for the Mort d'Ancestor and for the *De Nativo* Henry's

[1] This change I infer from the cases in Bracton's Note Book. On 18 July, 1822, a writ was sent to Ireland, fixing Richard's death as the period for the Mort d'Ancestor, in order to assimilate Irish to English law. See Sweetman's Calendar of Irish Documents p. 160.

[2] Bracton's Note Book, vol. i., p. 106; vol. iii., p. 230. Compare the Irish writ given in Statutes of the Realm, i., p. 4. The Statute of Merton in its printed form mentions not Brittany, but Gascony.

coronation.[1] As no further change was made until Henry VIII.'s day, this test is applicable only to the very earliest Registers. For Registers of the fourteenth century, however, we can use a somewhat similar criterion; when they mention Henry III., as they call him "pater noster," or "avus," or "proavus noster." But, good though such tests may be, they are by no means infallible. A man copying an already ancient Register might well be tempted to tamper with phrases that were obviously obsolete; and, again, we shall have cause to doubt whether even in the Chancery itself a new statute of limitations always sets the clerks on promptly overhauling their ancient books and making the necessary corrections; great is the force of official laziness. Still, these writs which mention periods of limitation are the parts of the Register which first attract the critic's eye.

But there is yet another difficulty. Are we justified in assuming that there always, or ever, was in the Chancery, some one document which bore the stamp of authority, and which was *the* Register for the time being? I doubt it. The absolutely accurate officialism to which we are accustomed in our own day is, to a large extent, the product of the printing press. The cursitors and masters of the mediæval Chancery had no printed books of precedents. It is highly probable that each of them had his MS. books; that these books were transmitted from master to master, from cursitor to cursitor, and that they differed much from each other in details.[2] To have prevented them from differing would have been a laborious and a needless task. This thought will be brought home to us by several passages in the printed book. In the first place, it is full of notes and queries: the writer expresses his doubts as to the best way of formulating this or that writ; he tells us what some think, what others think, what some do, and what others do; occasionally he speaks to us in the first person, says "credo" and "je croye," and even points out that this Register differs from other registers.[3] It is in this way that we may

[1] As regards the Novel Disseisin the change, if any, was but nominal; the first "voyage into Gascony" of the Statute of 1275 was "the voyage to Brittany" of the ordinance of 1237. In 1230 Henry went to Brittany, and thence to Gascony.

[2] The "Cursitores," or "Clerici de cursu," were the clerks who issued the writs of course. The name of Cursitor street still marks the site of their ancient home. As to their duties, see Fleta, p. 78.

[3] Thus, f. 3 b, "quaere comment le brief serra fait ou si le brief gyst;" f. 6 b, "quibusdam videtur quod debeat scribi in istis brevibus etc.;" f. 9, "sapientes et jurisperiti dicunt;"

explain the somewhat capricious selection of writs that the printed book presents. It naturally includes all the common forms that are in daily use; but it includes, also many forms of a highly specialized kind, — forms which set forth the facts of cases which have happened once, but are by no means likely to happen again. The Chancery undoubtedly had some power in itself to devise such "writs upon the special case;" not unfrequently it was ordered to make a writ suited to the very peculiar circumstances of a case which had been brought before the Council, or before the Parliament, just because none of the common writs would meet it.[1] Of such "*brevia formata*" we get a selection, but only a selection. Some are preserved because they will be useful as precedents, others, as it seems to me, because they are curiosities and not likely to form precedents.[2] In many quarters we see more signs of private enterprise than of official redaction. A considerable number of specially worded writs bear the name of Parning, — a number out of all proportion to the brief two years during which that famous common lawyer held the great seal. He had the good fortune, we may suppose, to have some industrious clerk for an admirer; his predecessors and successors were less lucky.[3] I greatly doubt,

f. 10 b, "secundum quosdam . . . sed alii dicunt;" f. 16, "et est contra registrum;" f. 27 b, "secundum quosdam fiant duo brevia;" f. 29 b, "secundum quosdam;" f. 97 b, "Nota quod non debet dici in brevi predicto *specialem auctoritatem ad hoc habentium* prout in quibusdam registris invenitur;" f. 108 b, "Nota per Thomam de Newenham; tamen alii clerici de cursu contradicunt;" f 120 b, "Tamen quaere . . . . per plusors sages dit est;" f. 121 b, "Les Maistres de la Chancerie ne voudrient agreer a cest clause;" f. 133, "Nota quidam addunt in istis tribus brevibus, etc.;" f. 134 b, "Vide de breve Statutum W. 2. c. 14 pro ista materia quia hic male reportatur;" f. 183 b. "Nota secundum quosdam . . . . et ideo quaere inde;" f. 172 b, "Je croye que son brief nest pas le pire;" f. 184 b, "Credo quod istud breve vacat;" f. 200, "Ascuns gents dirent — f. 208 b, "In breve de post disseisina non dicatur *tam de illis*, etc., secundum Escrick;" f. 243 b, "Mes le brief . . . est le meillour come cest register voet;" f. 269, "Ista clausula . . . . . non continetur in statuto sed additur per quosdam jurisperitos."

[1] The necessity for specialized writs is often noticed in the endorsements on petitions to Parliament; *e.g.*, in those of 14 Edw. II., Ryley's Placita, p. 408, "Habeat breve novæ disseisinæ in suo casu;" p. 409, "Adeat Cancellarium et habeat ibi breve in suo casu;" p. 412, "Habeat breve de conspiratione formata [conformatum] in suo casu;" p. 423, "Habeat breve de conspiratione in Cancellaria in casu suo formandum;" p. 421, "Habeant brevia suis casibus conveniencia." So in the Register we find writs issued by order of the Council; *e.g.*, f. 64, "per consilium;" f. 114, a writ founded on a Parliamentary petition; f. 124, "per consilium;" f. 125, "per consilium."

[2] F. 64 b, "Istud attachiamentum est notabile valde;" f. 224, "Nota quod istud breve sigillatum fuit et quassabille ut dicebatur pro veritate."

[3] Parning appears on f. 13 b, 16 b, 35, 69, 99 b, 100 b, 132, 136; in some other cases, though he is not named, we can tell, from the date of the writ, that it belongs to his

then, whether we have in strictness a right to speak about *the* Register of a given period, as though there were some one document exclusively or preëminently entitled to that name; rather we should think of *the* Register as a type to which diverse registers belonging to diverse masters and clerks more or less accurately conformed. About common matters these manuscripts agreed; about rarities and curiosities there was difference, and room for difference. There was no great need for a perfectly stereotyped uniformity; the fact that a writ was penned, and that it passed the seal, was not a fact that altered rights or secured the plaintiff a remedy; it still had to run the gauntlet in court, and might ultimately be quashed as unprecedented and unlawful. It is clear, indeed, that the granting of specially worded writs was regarded as an important matter, which required grave counsel and consideration; the masters were consulted as a body; sometimes it would seem as though the opinion of the justices was taken before the writ issued.[1] A chancellor, a master, even a cursitor, cannot have liked to see his writs quashed; and, though writs were quashed very freely, as the Year Books witness, still, if I mistake not, it will be found that in most cases the fault lay rather with the plaintiff or his advisers than with the Chancery; he had got an inappropriate writ, but not one that was in any respect contrary to law. Any notion that the Chancery was a Romanizing institution, that the learning of the masters was the learning of civilians, is rudely repelled by the Register. Whatever academic training in Roman and canon law the masters may have had, they were English

chancellorship. He is the only Chancellor that appears prominently. A certain Herleston appears in three places, f. 49, 80 b, 261; f. 261, "Hoc breve concessum fuit . . . . per cancellarium Lescrop et W. de Herleston," — *i. e.* (as I understand it) this writ was granted by the Chancellor, G. le Scrope, the Chief Justice, and W. de Herleston; the date of this writ seems to be 19 Edward III. Herleston was a Master in Chancery under Edward III. So, again, one Thomas of Newenham gets mentioned as a maker of writs; he seems to have been a Master under Edward III. and Richard II.; apparently we owe to him a writ against a vendor of a blind horse, who warranted it sound; see f. 108, 108 b, 151 b.

[1] Reg. Brev. Orig. f. 78 b, "Et les maistres W. de Aym. [Ayremine, Master of the Rolls?] et autres" expressed an opinion about a writ which does not commend itself to the annotator; f. 121 b, "Les Maistres de la Chancerie ne voudrient agreer a cest clause;" f. 131 b, "Ceux brefs furent enseales per tants les sages de la chancerie, per assent des serjeants le Roy et autres sages asses" [Nota quod hoc verbum *asses* non est verbum Anglicum sed verbum Franciscum]; f. 200, "Istud breve fuit concessum de assensu W[illelmum] de T[horpe] capitalis justiciarii et aliorum justiciorum de banco et clericorum de cancellaria."

lawyers, daily engaged in watching the development of English law in English courts, in reading the Year Books, and in "writing up" decisions in the margins of their Registers. Still, to return to my point, the granting of a newly worded writ was no judicial act; to grant one which could not be maintained was no act of justice; it might be a very proper experiment.

The Register of which I am speaking is the Register of Original Writs. The printed book contains also a Register of Judicial Writs. The difference between Original Writs and Judicial Writs is generally known. Roughly speaking, we may put it thus: An original writ is a writ whereby litigation is commenced; its type is a common writ of trespass or debt, whereby the sheriff is directed to compel the defendant to appear in court and answer the plaintiff; on the other hand, a judicial writ is a writ issued during the course of an action, either before or after judgment; thus, the re-summons of one already summoned, a *venire facias* for jurors, a *fieri facias*, an *elegit*,— these may be taken as types of judicial writs. But, in strictness, we are hardly entitled to bring into our definitions any particularization of the character of the writs. The technical distinction seems to have been a simpler one: the original writ issues out of the Chancery, the judicial issues out of a Court of Law; we can say no more. It sometimes happens that the same writ can be obtained in the Chancery or in the Common Pleas; in term time one gets it from the court, in vacation one goes to the Chancery; such a writ will, therefore, have its place in both Registers, the Original and the Judicial.[1] And very many of the documents which find a place in the former cannot be described as writs originating litigation; they relate to litigation that has been already begun. A tenant in an action begun by writ of right puts himself on the grand assize while yet the action is in the court baron or county court; the writ summoning the electors of the grand assize will issue out of the Chancery, and we must look for it in the Register of Original Writs. The same Register contains numerous writs evoking litigation from the local courts,— writs of *pone*, *certiorari*, *recordari facias*, and so forth. But, further, the fully developed *Registrum Brevium Originalium* contains great masses of documents which neither originate nor evoke litigation,— pardons, protections, safe-conducts, licenses to elect bishops and abbots, orders for the election of coroners and verderers, letters

[1] Reg. Brev. Orig. f. 32, 69 b.

whereby the king presents a clerk, fiscal writs addressed to the Barons of the Exchequer, writs to escheators, and so forth, in rich abundance ; even letters to foreign princes, begging them to do justice to Englishmen, find a place in the collection.[1] Many of these formulas, it may be, were never known as *brevia originalia*, and some were not *brevia* at all ; still, it would be very difficult to say where the original writs left off, for a great deal of what we might call fiscal and administrative work was done under quasi-judicial forms, and by the use of quasi-judicial machinery. The Exchequer, according to our ideas, was half law court and half financial bureau. The collection of the revenue, the management of the king's demesnes and feudal rights, were carried on by means of writs, inquests, verdicts, very similar to those which determined the rights of litigants. And happy it may be for us that no stricter separation was made between ordinary law and administrative law. Our present point, however, must be merely that all this great mass of miscellaneous matter is collected into the Register of Original Writs, and thus gets mixed up with the formulas of ordinary litigation. The later the MS. of the Register the larger is the proportion which the administrative documents bear to the writs which originate or evoke litigation, and, as we shall see hereafter, the general scheme of the book had become fixed at a time when it was still chiefly made up of writs subserving the process of litigation between subject and subject.

These things premised, it may be allowed me to make a few remarks about the early history of the Register.

It is highly probable that so soon as our kings began to interfere habitually with the ordinary course of justice in the communal and feudal courts, and by means of writs to draw matters into their own court, the clerks of the chancery began to collect precedents of such writs, and it well may be that some of the formulas that they used were already of high antiquity.[2] But the careful reader of Mr. Bigelow's "Placita" will, as I think, be led to doubt whether before the reign of Henry II. there was anything that could fairly be called a *Registrum Brevium*, and the student of Maddox's Exchequer will be inclined to hold that there were no writs that could be obtained "as of course" (*de cursu*) by appli-

[1] Reg. Brev. Orig., f. 129

[2] Brunner, Enstehung der Schwurgerichte, p. 78, compares the *breve de recto* with the Frankish *indiculus communitorius*.

cation to subordinate officials. Nothing was to be had for nothing; the price of writs was not fixed, and every writ was, in the terms of a later age, "a writ upon the special case." Before the end of Henry's reign there had been a great change, though the practice of selling royal aid (theoretically it was rather "aid" than "justice" that was sold) was by no means at an end. Already when Glanvill wrote there were many writs drawn up "in common form;" so drawn up, that is, as to cover whole classes of disputes. Let us follow him in his treatment of them. Not impossibly he took them up in the order in which they occurred in an already extant Chancery Register, and, as we shall see hereafter, the arrangement of the Register in much later times conforms, as regards some of its main outlines, to the arrangement of Glanvill's treatise.

In his first book he begins (cap. 6) with the *Præcipe quod reddat* for land, which he treats as the normal commencement of a petitory action. In the second book we have (cap. 8, 9) the writs of peace granted when a tenant has put himself on the grand assize; then (cap. 11) the writ summoning the electors of the grand assize, and (cap. 15) the writ summoning the recognitors. The third book, on warranty, does not give us any "original" writ. In the fourth book (cap. 2) occurs the Writ of Right of Advowson, the Writ (cap. 8) *Quo advocato se tenet in ecclesia;* a Prohibition (cap. 13) to ecclesiastical judges against meddling with a cause touching an advowson, and (cap. 14) a summons on breach of such a Prohibition. The fifth book, on serfage, gives us (cap. 2) the *De libertate probanda.* The sixth books turns to dower, and contains (cap. 5) the Writ of Right of Dower, a writ of *Pone* (cap. 7) for removing the case from the county court, the Writ (cap. 15) of Dower *unde nihil habet*, and the Writ (cap. 18) of Admeasurement of Dower. The seventh book, on inheritance or succession, has (cap. 7) the Writ *Quod stare facias rationalem divisam*, and (cap. 14) the writ to the Bishop, directing an inquiry into bastardy. In the eighth book comes (cap. 4) the Writ *de fine tenendo*, and several writs (cap. 6, 7, 10), *Quod recordari facias*, "evocatory writs" we may call them. In the ninth we have (cap 5) the Writ *De homagio capiendo*, the Writ of Customs and Services (cap. 9), a writ against a tenant who has encroached upon his lord (cap. 12), and the Writ *De rationalibus divisis* (cap. 14.) The tenth book gives us the Writ of Debt (cap 2), the Writ *De plegio*

acquietando (cap. 4), a writ for a mortgage creditor calling on the debtor to pay (cap. 7), a writ calling on the mortgagee to render up the land (cap. 9), a writ calling in the warrantor of a chattel (cap. 16). From the eleventh book we gather only a writ announcing the appointment of an attorney. In the twelfth book we come to the Writs of Rights, strictly so called (*brevia derecto tenendo*), and a number of writs empowering the sheriff to do justice; namely, the *Ne injuste vexes* (cap. 10), the *De nativo habendo* (cap. 11), a Writ of Replevin (cap, 12, 15), a Writ of Admeasurement of Pasture (cap. 13), a *Quod permittat* for easements (cap. 14), a Writ *De rationalibus divisis* (cap. 16), a Writ *Quod facias tenere divisam* (cap. 17), a Writ of *Justicies* for the return of chattels unlawfully taken by a disseisor, and a few other miscellaneous writs, including a Prohibition to Court Christian against meddling with lay fee. In the thirteenth book come the possessory assizes. The fifteenth gives a hasty sketch of criminal business.

Glanvill's scheme of the law, or rather his scheme of royal justice, might, as it seems to me, be displayed by some such string of catchwords as the following: "Right" (*i. e.*, proprietary right in land), "Church," "Liberty," "Dower," "Inheritance" or "Succession," "Actions on Fines," "Lord and Tenant," "Debt," "Attorney," "Justice to be done by feudal lords and sheriffs," "Possession," "Crime." Now, some of the main lines of this "*legalis ordo*," if I may use that term, keep constantly reappearing in the later history of the Register. At all events, two poles are fixed, — the *terminus a quo*, the *terminus ad quem*; we are to begin with "Right;" to end with "Possession." The reappearance of this scheme in the Register of later days is the more remarkable, because Bracton did not adopt it; as is well known, he begins with "Possession," and ends with "Right." We may make a further remark, which will be of use to us hereafter. Glanvill's twelfth book is most miscellaneous, and at one point resolves itself into a string of writs, which are given without note or comment. The idea which keeps the book together is that of justice done, not by the King's court, but by lords and sheriffs, in pursuance of royal writs. Such a tie is likely to be broken in course of time. Thus, the "Writ of Right Patent," the writ commanding a lord to entertain a proprietary action, is likely to find its proper place by the side of the *Præcipe quod reddat*, especially when Magna Charta has sanctioned the rule that a *Præcipe* is only to be issued when the tenant holds

immediately of the king.[1] And so, again, the writs commanding the sheriff to do justice, writs of "*Justicies*," or "*Justifices*," will hardly be kept together by this bond; but in course of time, as the king's own court extends, its sphere will fall into various subordinate places; thus, for example, "Debt by Justicies in the county court" will become an appendix or a preface to "Debt in the Bench."

The arrangement of Glanvill's book is, however, sufficiently well known, and therefore, without further reflection upon it, I will pass on to describe the earliest *Registrum Brevium* that I have seen. Happily it is one to which we can affix a precise date, namely, the 10th of November, 1227. It is found in a MS. at the British Museum (Cotton, Julius D., II, f. 143 b), — a book that once belonged to the monks of St. Augustine's, Canterbury. It forms a schedule annexed to a writ of Henry III., bearing the date just given, and directed to the people of Ireland. That writ recites that the king desires that justice be done in Ireland according to the custom of his realm of England, and states that for this purpose he is sending a formulary of the writs of course (*formam brevium de cursu*), and wills that they be used in the cases to which they are applicable. The writ was issued at Canterbury, and to this fact we probably owe its lucky preservation in a Canterbury book. The Register that it gives is about forty years younger than Glanvill's treatise, and affords the means of measuring the growth of law during an important period, — the period of the Great Charter. I will briefly describe its contents.

It begins with three Writs of Right (1, 2, 3), and we learn that these writs can only be had "*sine dono;*" that is, without payment, when the land demanded is but half a knight's fee or less, or the service due from it does not exceed 100 shillings, or, being a burgage tenement, the rent or the value of the buildings does not exceed 40 shillings a year. Then follows (4) the *Præcipe in capite*. Then (5) the *Novel Disseisin*, the period of limitation being stated as "*post ultimam transfretacionem nostram de Hibernia in*

[1] Originally a Writ of Right is so called, because it orders the feudal lord to do full right to the demandant, ***plenum rectum tenere;*** and in this sense, the ***Præcipe quod reddat*** is no Writ of Right. But when possessory actions have been established in the King's court, "right" is contrasted with "seisin," and all writs originating proprietary actions for land, including the ***Præcipe in capite***, come to be known as Writs of Right. This has been remarked by Brunner, Schwurgerichte, p. 411.

Angliam;"[1] and as an appendix to this we have (6) the Novel Disseisin of Common, and (7) the Assize of Nuisance, with variations. Next comes (8) the Mort d'Ancestor; the period of limitation is said to be *postquam coronacionem H. patri nostris.*[2] Then come (9) the assize of Darrein Presentment, (10) Prohibition to the bishop against admitting a parson, (11) Writ ordering a bishop to disencumber the church when he has admitted a parson contrary to such Prohibition, (12) Mandamus to a bishop to admit a presentee, (13) Writ of Right of Advowson, (14) Prohibition to ecclesiastical judges, (15) Writ against ecclesiastical judges who have disobeyed the Prohibition. This ecclesiastical group being finished, we find next (16) the Writ of Peace for a tenant who has put himself on the grand assize, and (17) a writ for the election of the grand assize. And here we have an interesting note: "*Et notandum quod in hac assisa non ponuntur nisi milites et debent jurare precise quod veritatem dicent non audito illo verbo quod in aliis recognitionibus dicitur scilicet a se nescienter.*" Unless I am traducing the copyist, something must have gone wrong with these last words. They were French, but he took them for Latin. In the grand assize the recognitor must swear, in an unqualified way, that he will tell the truth; while in all other recognitions he may add "a son ascient;" that is, "according to his knowledge." A small group of writs relating to dower (18, 19, 20) come next. Then follows (21) the *Juris Utrum*, which, it is remarked, lies either for the clerk or for the layman.[3] Next (22) comes the Attaint which can be brought against recognitors of Novel Disseisin, Mort d'Ancestor, Darrein Presentment, but not against the recognitors of the Grand Assize. Then (23) we have an action on a fine, "*Præcipe A. quod teneat finem,*" and (24) the action of *Warrantia Cartæ.* Writs of Entry are represented by but two specimens: the first is (25) Entry *ad terminum qui præteriit,*

[1]This must be a blunder; it should have been "post ultimam transfretacionem patris nostri de Hibernia in Angliam."

[2]Here again there must have been some carelessness. The date referred to is the coronation of Henry II., the present king's grandfather. The mistake would seem to be due not to the monastic copyist, but to the Chancery clerk who drew up the document sent to Ireland, and was not careful to change into "avi" the "patris" which stood in a formula of John's reign, from which he was copying. See Sweetman's Calendar of Irish Documents, pp. 37, 160.

[3]This was a moot point in Bracton's day. Pateshull allowed the laymen the assize, but afterwards changed his mind. Bracton thinks this a change for the worse. Bract., f. 285 b.

the second (26) is *Cui in vita.* Then we find (27) *quod capiat homagium,* (28) writs for sending knights to view an essoinee, and (29) to hear a sick man appoint an attorney. On these follow (30) the *De nativo habendo,* (31) the *De libertate probanda,* (32) the *De rationabilibus divisis,* and (33) the *De superoneracione pasturæ.* We pass to criminal matters, and get (34) the writ to attach an appellee to answer for robbery, rape, or arson, with a note that in case of homicide the appellee is to be attached, not by gage and pledge, but by his body; as a sequel to this comes (35) the *De homine replegiando.* We return to civil matters, and find (36) the Writ of Services and Customs, and (37) the *Ne injuste vexes.* Then comes (38) Debt and Detinue. The only writ that falls under this head is a *Justicies,* and not, like Glanvill's Writ of Debt, a *Præcipe;* and there is this further difference, that the remarkable words, "*et unde queritur quod ipse ei injuste deforciat,*" which occur in Glanvill's writ, and make it look so very like a Writ of Right, have disappeared. The supposed debt in the Irish Register is one of 20 shillings, and we have this important note: "In the same fashion a writ is made for a charter, '*quam ei commisit,*' or for a horse or for chattels to the value of 40 shillings, '*sine dono*' [*i. e.,* without any payment to the king], for if the debt or price exceeds 40 shillings the words must be added: '*accepta ab eo* [the plaintiff] *securitate de tercia parte de primis denariis ad opus Regis.*'" In Ireland. at all events, the king will only become a collector of debts for the modest commission of 33⅓ per cent.

To this succeeds (39) a Prohibition to ecclesiastical judges against dealing with lay fee, and (40) a writ to compel them to answer for breach of such a prohibition. Next occurs (41) a writ directing the sheriff not to suffer an infant to be impleaded, and (42) a *Recordari facias* applicable to a case in which a tenant has vouched an infant. Then we have (43) a *Justicies de plegio acquietando* for a debt of forty shillings or less; "*non habebit ultra xl. sol. sine dono.*" Then comes (44) a writ forbidding the sheriff to distrain R., or permit him to be distrained, to render ten marks to N., for which he is neither principal debtor, nor pledge; but "this writ does not run in privileged cities, or where the debtor is the king's debtor." Another writ (45) forbids the sheriff to distrain R. for money promised to the king "for right or record," *i. e.,* for money promised in consideration of the king's aid in litigation, if, without his own default, he has not got what he stipulated for. Another writ (46)

forbids the sheriff to distrain a surety when the principal debtor can pay; but this writ is not to be issued when the debt is one that is due to the king. Then (47) comes a writ of Mesne by way of *Justicies*, and (48) the *De excommunicato capiendo.* Upon this follows (49) covenant "*si quis conventionem fecerit albi quam in curia domini Regis cum vicino suo qui eam infringere voluerit de aliqua terra vel tenemento ad terminum si exitus illius tenementi non excesserint per annum xl. solidos;*" the writ is a *Justicies* "*quod teneat conventionem.*" We have then (50) a Writ of Dower, and (51) a Writ of Waste against a dowager. Miscellaneous writs follow: (52) a *Venire facias* for an assize; (53) a *Pone ad peticionem petentis;* (54) a summons for a warrantor; (55) a writ to inquire of the bishop touching the marriage of a woman claiming dower; (56) a writ directing a view of the land demanded.

So ends the Irish Register, an important document. It brings out very forcibly the king's position as a vendor of justice, or rather, as we have said, of "aid." We must, as it seems to me, believe, until the contrary be shown, that we have here a fairly correct representation of the writs that were current in England in 1227; the writs that were "of course" and to be had at fixed prices; but some may have been omitted as inapplicable to Ireland.

Before making further comments, let us turn to an English *Registrum*, which, so far as I can judge, must be of very nearly the same date as this Irish *Registrum.* It is found in a Cambridge MS. (Ii. vi. 13), and may, I think, be safely ascribed to the early years of Henry III.'s long reign; for I can see no trace in it of the Statute of Merton. The book contains a copy of Glanvill's treatise, which is followed by a *Registrum*, and of this we will note the contents. I add references to Glanvill's treatise, and to the Irish Register; the latter of these I will designate by the symbol "Hib." while the Cambridge MS., now under consideration, I shall hereafter refer to as CA.

1. Writ of right addressed "Roberto de Nevill;" with several variations. (Glanv. xii, 2; Hib. 1.)

2. Writ of right "*de rationabili parte.*" (Glanv. xii, 5.)

3. *Præcipe in capite.* (Glanv. i, 6; Hib. 4.)

4. *Pone;* this will only be granted to a tenant "*aliqua ratione precisa vel de majori gratia.*" (Hib. 53.)

5. Writs of peace when tenant has put himself on grand assize. (Glanv. ii, 8, 9; Hib. 16.)

6. Writ summoning electors of grand assize, "*et nota quod in hac assisa non ponuntur nisi milites et precise jurare debent.*" (Glanv. ii, 11; Hib. 17.)

7. *De recordo et judicio habendo.*

8. *Procedendo* in writ of right.

9. Respite of writ of right so long as tenant is "*in servicio nostro in Pictavia vel in Wallia cum equis et armis per preceptum nostrum.*" Respites (Hib. 41) where a tenant or vouchee is an infant.

10. *Warrantia cartæ.* (Hib. 24.)

11. Entry "*ad terninum que preteriit.*" (Cf. Glanv. x, 9; Hib. 25.)

12. Entry "*cui in vita.*" (Hib. 26.)

13. *De homagio capiendo.* (Glanv. ix, 5; Hib. 27.)

14. Novel disseisin;[1] limitation "*post ultimum reditum domini J. patris nostri de Hybernia in Angliam.*" (Glanv. xiii, 33; Hib. 5.)

15. Novel disseisin of pasture; same limitation. (Glanv. xiii, 37; Hib. 6.)

16. Mort d'Ancestor;[2] limitation "*post primam coronacionem R. Regis avunculi nostri.*" (Glanv. xiii, 3, 4; Hib. 8.)

17. *De nativo habendo;*[2] same limitation. (Glanv. xii, 2; Hib. 30.)

18. *De libertate probanda.* (Glanv. v, 2; Hib. 31.)

19. *De rationabilibus divisis.* (Glanv. ix. 14; Hib. 32.)

20. *De superoneratione pasturæ.* (Hib. 33.)

21. Replevin. (Glanv. xii, 12, 15.)

22. *De pace regis infracta;* writ to attach appellee by gage and pledge in case of robbery or rape. (Hib. 34.)

23. *De morte hominis;* writ to attach appellee by his body. (Hib. 34.)

24. *De homine replegiando.* (Hib. 35.)

25. Services and customs; a "*justicies.*" (Glanv. ix, 9; Hib. 36.)

26. *Ne injuste vexes.* (Glanv. xii, 10; Hib. 27.)

27. Debt; a "*justicies;*" "*reddat B. x. sol. quos ei debet ut dicit, vel cartam quam ei commisit custodiendam.*" (Glanv. x, 2; cf. xii, 18; Hib. 38.)

28. Prohibition to ecclesiastical judges against entertaining a suit touching a lay fee. (Glanv. xii, 21; Hib. 39.)

29. Similar prohibition to the litigant. (Glanv. xii, 22.)

30. Prohibition in case of debt or chattels, "*nisi sint de testamenti vel matrimonio.*"

31. Attachment for breach of prohibition. (Hib. 40.)

[1] I believe that this writ would have been antiquated after 1229.
[2] These writs seem older than 1237.

32. *De plegiis acquietandis.* (Glanv. x, 4; Hib. 43.) Also (32*a*) a writ forbidding the sheriff to distrain the surety while the principal debtor can pay. (Hib. 46.)

33. Mesne. (Hib. 47.)

34. Aid to knight lord's son or marry his daughter.

35. *De excommunicato capiendo.* (Hib. 48.)

36. Covenant; *justicies;* "*de x. acres terre.*" (Hib. 49.)

37. Writ announcing appointment of attorney.

38. Writ to send knights to hear sick man appoint attorney. (Hib. 29.)

39. Writ sending knights to view essoinee. (Hib. 28.)

40. Darrein presentment. (Glanv. xiii, 19; Hib. 9.)

41. Prohibition in case touching advowson. (Glanv. iv, 13; Hib. 14.)

42. Writ of right of advowson. (Glanv. iv, 2; Hib. 13.)

43. Writ to bishop for admission of presentee. (Hib. 12.)

44. *Quare incumbravit.* (Hib. 11.)

45. Attachment for breach of prohibition. (Glanv. iv, 14; Hib. 11.)

46. Dower "*unde nihil habet.*" (Glanv. vi, 15; Hib. 18.)

47. Dower "*de assensu patris.*" (Hib. 19.)

48. Dower in London.

49. *Juris utrum.* (Glanv. xiii, 24; Hib. 20.)

50. Attaint; the assize was taken "*apud Norwicum coram H. de Bargo, justiciario nostro.*"[1] (Hib. 22.)

51. *De fine tenendo;* the fine made "*tempore domini J. patris nostri.*" (Glanv. viii, 6; Hib. 23.)

52. *Quare impedit.*

53. Writ of right of ward in socage.

54. Writ of right of ward in chivalry.

55. Assize of nuisance; vicontiel or "little" writ of nuisance; limitation "*post ultimum reditum domini J. Regis patris nostri de Hybernia in Angliam.*" (Cf. Glanv. xiii, 35, 36; Hib. 7.)

56. *Ne vexes abbatem contra libertates.*

57. *Quod permittat* for estovers; a *justicies.*

58. *Quod faciat sectam ad hundridum vel molen dinum.*

Comment on these two Registers I must for a while postpone; I hope to be allowed to return to the subject on some future occasion.

F. W. Maitland.

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[*To be continued.*]

[1] This seems a reference to an eyre of 1222.